Intermec Technologies Corp. v. Palm, Inc. Doc. 139 Att. 19

IN THE CIRCUIT COURT OF HILLSBOROUGH COUNTY, FLORIDA

Carla Spears, individually, and on behalf of those similarly Situated,

Plaintiff,

v.

Netflix, Inc., Wal-Mart Stores, Inc. and Walmart.com, USA LLC

Defendants

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Case No. ____________

Class Representation

DIVISION

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**CLASS ACTION COMPLAINT**

Plaintiff brings this civil action for damages on her own behalf and on behalf of all similarly individuals against Netflix, Inc. ("Netflix"), Wal-Mart Stores, Inc. ("WalMart Stores") and Walmart.com, USA LLC ("Walmart.com") for restraint of trade for monopolizing the online DVD rental and DVD sales markets (online and in stores) and state and allege as follows:

**INTRODUCTION**

1. Plaintiff brings this class action pursuant to Florida's Deceptive and Unfair Trade Practices Act ("FDUTPA"), F.S. §§ 501.201 *et seq.*, under which direct purchasers have standing to sue for antitrust injuries against Defendants.

2. This case arises out of Defendants' monopolization and manipulation of the market for online DVD rentals and sales beginning by at least May 15, 2005 to the present which caused prices for online DVD rentals and DVD sales to be artificially high for Plaintiff and the Class.

**JURISDICTION AND VENUE**

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3. This Court has jurisdiction because Plaintiff asserts civil claims pursuant to FDUTPA, §§ 51.201 *et seq*. for full consideration damages, trebled, attorneys' fees, pre-judgment interest, and costs.

4. Venue in Hillsborough County is appropriate because, among other reasons, a substantial part of the trade and commerce, as well as the injury giving rise to the Plaintiff's claims, including but not limited to the online rental and sales of DVDs at supra-competitive prices occurred in said County.

## NO FEDERAL COURT JURISDICTION

5. This case has been expressly pled to circumvent federal jurisdiction as is Plaintiff's right under CAFA and federal jurisprudence.

6. Plaintiff, and the putative Class, assert no federal cause of action, and expressly disclaim any federal claim. Only state law claims under Florida law are asserted.

7. Plaintiff, and each and every class member, each seek less than $75,000, including prorated attorneys' fees and costs.

8. Plaintiff and the putative Class do not seek any type of equitable, declaratory, injunctive, or forward looking relief.

## PARTIES

### Plaintiff

9. Plaintiff Carla Spears was a Florida citizen for the entire Class Period, and purchased DVDs from Wal-Mart Stores for her personal, noncommercial use in

Florida during the Class Period, and was injured by the antitrust acts alleged in this Complaint.

**Defendants**

10. Defendant Netflix is a publicly traded Delaware Corporation with its principal place of business at 100 Winchester Circle, Los Gatos, California.

11. Defendant Wal-Mart Stores is a publicly traded Delaware Corporation with its principal place of business at 702 S.W. 8th Street, Bentonville, Arkansas.

12. Defendant Walmart.com is a wholly-owned subsidiary of Wal-Mart Stores. Walmart.com is a Delaware Corporation with its principal place of business at 7000 Marina Blvd, Brisbane, California.

## BACKGROUND

13. Netflix, through the internet, rents DVDs to customers nationwide by charging customers monthly subscription fees which entitle customers to rent DVDs pursuant to various subscription plans. Netflix's revenues exceed $1 billion annually. At all times during the class period, Netflix has had a market share of at least 75% of the online DVD market in the United States, as Defined herein.

14. Wal-Mart Stores is the largest retailer in the United States. Wal-Mart Stores' revenues are approximately $400 billion annually. Through its retail stores and the internet, Wal-Mart Stores sells DVDs directly to customers nationwide. Wal-Mart Stores sells far more DVDs than any other retailer in the United States, accounting for approximately 40% of domestic DVD sales.

15. Prior to the conspiracy described herein, Walmart.com competed with

Netflix by renting DVD's online through the website www.walmart.com.

16. On or about May 19, 2005, Netflix, Inc., Wal-Mart Stores, and Walmart.com entered into a contract, combination, and conspiracy (the "Market Division Agreement") to divide the markets for the online rentals of Digital Video Discs ("DVDs") and for the sale of new DVDs in the United States. The purpose and effect of Defendants' illegal conduct and agreement is to monopolize and unreasonably restrain trade in the online DVD rental market.

17. The meetings that culminated in the illegal agreement began in early 2005, when the CEO of Netflix and the then CEO of Walmart.com met to discuss the online DVD rental business and the new DVD sales business. The CEOs wanted to discuss ways in which they could reduce or eliminate competition and thereby increase their profits. Reed Hastings, the CEO of Netflix, having "noticed how low Wal-Mart's prices [for DVDs] were," has admitted that he "called the CEO [of Walmart.com] in January and asked if he could have dinner." John Fleming, then the CEO of Walmart.com, who reported directly to Wal-Mart Stores' CEO Lee Scott, accepted Hastings' invitation. As a result of this dinner meeting, as well as other meetings and exchanges, Defendants entered into the contract, combination, and conspiracy alleged herein. At the time of their initial meeting and prior to entering into to the Market Division Agreement, Netflix and Walmart.com were direct competitors in the online rental DVD market and were potential competitors in selling new DVDs to customers. Wal-Mart Stores and Walmart.com were already selling new DVDs and Netflix was preparing to enter that market. No later than May 19, 2005 however, Netflix, Wal-Mart Stores, and Walmart.com entered into an agreement whereby Walmart.com would stop competing

with Netflix in the online DVD rental market, and in return, Netflix would promote the sales of new DVDs by Wal-Mart Stores and Walmart.com. Netflix also agreed not to sell new DVDs that would have been in direct competition with Wal-Mart Stores and Walmart.com.

18. Wal-Mart Stores actively participated in this conspiracy. This is confirmed by, among other things, the fact that prior to the announcement of the Market Division Agreement, John Fleming was promoted to Chief Marketing Officer of Wal-Mart Stores. As of the time of the announcement of the Market Division Agreement, Fleming thus was acting in his capacity both as the Chief Marketing Officer of Wal-Mart Stores and the Wal-Mart Stores executive responsible for overseeing the operations of Walmart.com. As Chief Marketing Officer of Wal-Mart Stores, Fleming was responsible for deciding "what the largest, most powerful retailer in history will stock on its shelves, and how much those products will cost. Such decisions, when made at Wal-Mart, can help make or break entire industries."

19. As a result of the Defendants' contract, combination, and conspiracy, Netflix was able to charge its customers higher subscription prices for the rental of DVDs than it otherwise would have been able to charge. In addition, Netflix unlawfully acquired and maintained market and monopoly power.

20. Under the Market Division Agreement, Netflix, Wal-Mart Stores, and Walmart.com agreed that they would restrain trade and eliminate competition. Wal-Mart Stores and Walmart.com agreed that Walmart.com would stop competing with Netflix in the online DVD rental market and Netflix agreed that it would not sell new DVDs and instead would promote the DVD sales of Wal-Mart Stores and Walmart.com.

In agreeing to promote the sale of DVDs by Wal-Mart Stores and Walmart.com, Netflix provided consideration for the agreement by Wal-Mart Stores and Walmart.com to exit the online DVD rental market and simultaneously confirmed to Wal-Mart Stores and Walmart.com that Netflix would not enter the market to sell new DVDs. Netflix was well-positioned to enter the new DVD sales market, and had the unilateral economic incentive to do, so but refrained from doing so as a result of the Market Division Agreement. Since entering into the Market Division Agreement, neither Wal-Mart Stores nor Walmart.com has rented DVDs online and Netflix has not sold new DVDs. The Market Division Agreement served to entrench and enhance Defendants' dominant market positions and otherwise harmed competition, including by enabling Netflix to charge higher subscription prices for online DVD rentals than it would have charged had it not entered into the agreement. In fact, Plaintiff and all other similarly situated customers paid the higher subscription prices to Netflix than they otherwise would have paid.

21. This action is brought by Plaintiff individually and on behalf of all other similarly individuals in Florida, and pursuant to Fl. R. Civ. P. 1.220, as representatives of a class (the "Class"). In particular, Plaintiff asserts that a class action is appropriate under Fl. R. Civ. P. 1.220(b)(3).

22. The Class is defined as:

> Any person in the state of Florida who paid a subscription fee to Netflix to rent DVDs and/or who purchased DVDs from Wal-Mart Stores, on or after May 19, 2005 up to the present. Excluded from the Class are governmental entities, Defendants, their co-conspirators and their representatives, their parents, subsidiaries, and other affiliated entities

23. Plaintiff reserves the right to expand, modify or alter the class definition, including the time period, in response to information learned during discovery.

24. Plaintiff does not presently possess information identifying the exact size of the Class. Based upon the nature of the trade and commerce involved, Plaintiff believes the total number of class members is sufficiently numerous such that joinder of all Class members would be impracticable.

25. Numerous questions of law or fact arise from Defendants' anticompetitive conduct which are common to the class. Among the questions of law or fact common to the class are:

a. Whether Defendants engaged in a contract, combination, or conspiracy to allocate markets;

b. Whether Defendants unreasonably restrained trade in the online DVD Rental and DVD sales markets:

c. Whether Defendants attempted to monopolize the online DVD Rental and sales Markets;

d. The nature and character of the acts performed by Defendants in the furtherance of the alleged contract, combination, and conspiracy;

e. Whether the alleged contract, combination, and conspiracy violated the Florida Antitrust Act;

f. Whether the alleged contract, combination, and conspiracy violated The Florida Deceptive and Unfair Trade Practices Act;

g. The anticompetitive effects of Defendants' violations of law;

h. Whether the conduct of Defendants, as alleged in this Complaint, caused Netflix subscription fees to be higher than they otherwise would have been and/or Wal-Mart's DVD sales prices and thereby caused injury to the business and property of Plaintiff and other members of the Class;

26. These common questions of law or fact are common to the class, and predominate over any other questions affecting only individual class members.

27. Plaintiff in this proposed class action asserts claims typical of those of the individual members of the proposed Class. Plaintiff has no interests antagonistic to those of the Class, and Defendants have no defenses unique to Plaintiff.

28. Plaintiff will fairly and adequately represent and protect the interests of the members of the Class and has no interests antagonistic to the Class. Plaintiff has suffered the same harm as the members of the Class and has, and will continue to, zealously pursue claims against Defendant. Plaintiff has retained counsel competent and experienced in the prosecution of complex class actions, and in particular, counsel has broad experience in complex antitrust litigation similar in size, scope, and complexity to the present case.

29. A class action is superior to the alternatives, if any, for the fair and efficient adjudication of this controversy. The damages suffered by each individual Class member will likely be relatively small, especially given the burden and expense of individual prosecution of the complex litigation necessitated by Defendants' conduct. Thus, it would be virtually impossible for the Class members individually to redress effectively the wrongs done to them. Moreover, even if the Class members themselves could afford such individual litigation, the judicial system could not. Individualized litigation presents a potential for inconsistent or contradictory judgments. Individualized litigation increases the delay and expense to all parties and the judicial system due to the

complex legal and factual issues presented by this case. By contrast, the class action device presents far fewer management difficulties and provides the benefits of single adjudication, economy of scale, and comprehensive supervision by a single court.

**COUNT I**
**(FDUPTA VIOLATION)**

30. Plaintiff hereby adopts and incorporate by this reference each of the preceding paragraphs as if fully set forth herein.

31. During the Class Period, Defendants restrained trade in the online DVD rental and sales market and thereby artificially increased the prices for the online rental and purchase of DVDs.

32. This restraint of trade or commerce in Florida had a substantial and adverse impact on prices for the online rental and purchase of DVDs in Florida during the Class Period.

33. Defendants' conduct constitutes unfair methods of competition, unconscionable, deceptive and/or unfair acts or practices in the conduct of trade and/or commerce in violation of FDUPTA, F.S. §§ 501.01, *et. seq.*

34. As a result, Plaintiff and other members of the Class have sustained damages in an amount to be determined at trial.

**PRAYER**

WHEREFORE, Plaintiff prays for judgment against Defendants and respectfully requests the Court:

1. Certify this action to proceed as a class action pursuant to Fla. R. Civ. P. 1.220, appoint Plaintiff as Class Representatives, and Plaintiff's counsel as Class Counsel, and direct that reasonable notice be given to members of

the Class;

2. Adjudge and decree that Defendants engaged in an unlawful conduct in restraint of trade or commerce, in violation of the FDUPTA, 501.201 *et seq*. causing antitrust injuries, and that the Court award Plaintiff and the Class: (i) overcharge damages in an amount to be proved at trial as a result of the wrongful conduct alleged; (ii) treble such damages under the Florida Antitrust Act; (iii) pre-judgment and post-judgment interest; (iv) reasonable attorneys' fees, and (v) costs of Court.

3. Grant such other and further relief as the Court deems just and proper.

**JURY DEMAND**

Plaintiff demands a trial by jury.

**ATTORNEYS' LIEN CLAIMED:**

Respectfully submitted,

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